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No. 71-14-01

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SUPREME COURT, U.S.

In The Supreme Court of The United States

October Term, 1971

IN THE MATTER OF
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

RICHARD JOYCE SMITH, TRUSTEE OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR,

PETITIONER

v.

George P. Baker, Richard C. Bond, Jervis Langdon, Jr. and Willard Wirtz, Trustees of the Property of Penn Central Transportation Company, Debtor; Manufacturers Hanover Trust Company, as Mortgage Trustee; and Penn Central Transportation Company;

RESPONDENTS

REPLY BRIEF IN SUPPORT OF CERTIORARI

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Dated: June 7, 1972

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I. The Decision Below Presents Important Legal Questions That Should Now Be Settled By This Court.

The decision below is novel and unprecedented in that it strips the New Haven Reorganization Court of its reorganization jurisdiction and, also, of its power to protect the constitutional rights of the New Haven bondholders from further erosion in the Penn Central reorganization; misconstrues *Warren* v. *Palmer*, 310 U.S. 132; and, is generally significant in attempting to delineate the coordinate jurisdiction of two reorganization courts, each having "exclusive jurisdiction."

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Only this Court can construe its mandate with finality. It should do so now in order to protect the New Haven creditors, and to expedite the reorganization process.

In opposing certiorari, the Penn Central Trustees and Manufacturers Hanover Trust Company mainly argue the merits of the Court of Appeals' decision that the New Haven Reorganization Court lacked jurisdiction to enter its order of remand. Their briefs are tellingly limited in meeting the grounds stated in the Petition why, pursuant to Rule 19 of this Court, certiorari should be granted.

Respondents' only arguments which fairly pertain to the Rule 19 standards are that: the factual issues, but not the legal issues, are unique; no question of general importance under the bankruptcy laws is raised; and it is premature to consider the substantive issues.

1. That the facts are unique may readily be agreed; but they are all established of record. As to the issues of law, it must fairly be agreed that they are novel and of broad significance. Further, the nature of the questions and their litigation history categorically establish that only this Court may resolve them. Specifically, and apart from questions of general significance, the issues involved require an interpretation of this Court's own remand to one of two district courts, each of which has claimed exclusive jurisdiction under §77 of the Bankruptcy Act to decide the issues at bar.

The New Haven Reorganization Court's claim to jurisdiction is based upon the specifics of this Court's remand in the *New Haven Inclusion Cases,* 399 U.S. 392, and its own reservation of jurisdiction entered at a time when both the Interstate Commerce Commission (the "Commission") and the New Haven Reorganization Court considered that the public interest required a conveyance of the New Haven's assets before the intertwined terms of consideration and payment could be finally fixed. That reservation of jurisdiction was itself based upon the findings of this Court in the *Penn Central and N&W Inclusion*

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Cases, 389 U.S. 486, that Penn Central was unconditionally bound to meet terms of payment for the New Haven's assets ultimately determined by the Commission and the New Haven Reorganization Court as being fair and equitable under §77 (and §5 of the Interstate Commerce Act).

On the other hand, and based upon precisely the same opinion and remand of this Court, the Penn Central Reorganization Court claimed "exclusive jurisdiction" pursuant to §77 over the same former New Haven assets, and construed the remand to the New Haven Reorganization Court actually as ousting the New Haven Reorganization Court from all jurisdiction. (See appendix to brief of Penn Central Trustees.) The Court of Appeals for the Second Circuit reached the same result but on an entirely different theoretical basis. It considered that *Warren v. Palmer, supra*, wholly ousted the New Haven Reorganization Court from jurisdiction under §77 and vested it solely in the Penn Central Reorganization Court, notwithstanding the duties of the New Haven Reorganization Court under §77 to make specific findings regarding approval (or rejection) of a reorganization plan, to confirm a plan, to consider so-called "cram-down" provisions in the event of adverse votes, and to oversee the steps leading to consummation of the plan. At the same time, however, the Court of Appeals made it clear that it did not disagree with the equitable protection deemed necessary by the New Haven Reorganization Court in its limited exercise of jurisdiction.

The Penn Central Reorganization Court, in asserting its jurisdiction, unequivocally entertained and sanctioned a collateral attack by the Penn Central Trustees on the judgment of the New Haven Reorganization Court in direct conflict with, and disregard of, the specific holdings of this Court in such cases as *Durfee v. Duke*, 375 U.S. 106; *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371; *Treinies v. Sunshine Mining Co.*, 308 U.S. 66; and *Stoll v. Gottlieb*, 305 U.S. 165.

These sweeping issues stem from the unique fact that

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the New Haven creditors were *compelled* to stand by, because of public interest considerations, while the property that comprised their entire security was ordered to be conveyed to Penn Central. It may be granted that it was reasonable at that time for the Commission and the Courts to assume that the transaction would be carried out on a basis approved after full judicial consideration. However, at the time when Penn Central became bankrupt, the transaction had not been completed. It is in the executory nature of the transaction that the basic and troublesome questions of jurisdiction of two federal district courts under §77 have their genesis.

Thus, both the underlying questions of fact and law are unique, and the questions of law raised by the decision of the Court of Appeals here sought to be reviewed are precisely defined, novel, and of current and substantial importance, as hereinafter discussed.

2. With respect to the general importance of the questions involved in the Petition, the significance of the pending number of reorganizations under §77 of the Bankruptcy Act cannot be disparaged, as suggested by the Penn Central Trustees, in weighing the importance of a resolution of the jurisdictional meaning of *Warren v. Palmer, supra*. Not only must jurisdictional boundaries and the New Haven's rights be resolved as set forth in the Petition, but questions of "exclusive jurisdiction" also exist in other pending reorganizations under §77; for instance, in the reorganization of Lehigh Valley Railroad Company, a subsidiary of Penn Central. In that case, questions of "exclusive jurisdiction" already exist for the respective creditors of Lehigh Valley and Penn Central where the same district court (in fact, the same judge) has "exclusive jurisdiction" over conflicting claims in the two reorganizations.

3. Respondents' contentions that a present review of the issues would be premature, at worst, endorse a philosophy of adjudication by postponement, and at best, have only circumstantial relation to a determination whether the Peti-

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tion should be granted. The hard facts are that there is now outstanding a judgment of the New Haven Reorganization Court which held not only that it had jurisdiction, but that equity required the New Haven creditors to be secured by an equitable lien and constructive trust for the payment found by this Court in the *New Haven Inclusion Cases, supra*. Whether the Penn Central Reorganization Court would ever reach the same result, or whether the New Haven Trustee would have an opportunity at some undefined future occasion to claim such protection, has no bearing on determination of the Petition. The constitutional significance to the New Haven creditors now to be made secure in their right to payment, no matter what form the payment may eventually take as a consequence of a Penn Central reorganization plan approved by the Penn Central Reorganization Court, may not fairly be gainsaid. It is no answer to the New Haven creditors that the Petition should be denied because, although the Penn Central Reorganization Court sanctioned a collateral attack on the judgment of the New Haven Reorganization Court, it voluntarily provided the New Haven Trustee with "a lien, indeterminate in amount and indeterminate as to priority" (Penn Central Trustees' brief, 21a), pending some future determination.

4. As noted above, respondents' briefs deal principally with the merits of the decision of the Court of Appeals. In that context certain of the arguments particularly require factual clarification.

At page 15 of the Penn Central Trustees' brief, it is stated that no one appealed the order of the New Haven Reorganization Court which provided for conveyance of the New Haven's assets to Penn Central "free and clear of all liens, charges and encumbrances." In fact, that provision was conditioned upon specific exceptions, including reservation of the right of New Haven creditors to litigate the terms and of the court to adjudicate the issues so raised. Of primary significance is that the quoted language was necessarily required to be contained in the order so

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that the specific terms of the plan of reorganization which the Commission had certified to the New Haven Reorganization Court could be executed without any hiatus in the transportation services provided to the public by the New Haven. Without such provision there could have been no conveyance pursuant to the plan by January 1, 1969, when the New Haven's operations were scheduled to cease. The reason why the New Haven interests did not appeal from that order was that the specific conditions expressly provided by the New Haven Reorganization Court, with the concurrence of the Commission, were that the "free and clear" conveyance was "without prejudice to the right of any party to contest the fairness and adequacy of the consideration and the other terms of the inclusion." (Order No. 559, December 24, 1968; Manufacturers' brief, 7A). As pointed out by the New Haven Reorganization Court, furthermore, the form of the conveyance did not "constitute a waiver of the chancellor's equitable lien or a bar to his power to create one" (New Haven Trustee's Petition, A43).

At page 16 of the Penn Central Trustees' brief, it is stated that the decision of the Court of Appeals "is in accord with the only previous decision by this Court dealing with a conflict between the respective jurisdictions of two Section 77 reorganization courts," citing *Warren v. Palmer, supra.* The decision of the Penn Central Reorganization Court, attached to the Penn Central Trustees' brief, and cited by them as a principal basis for denial of certiorari stated, however: "Since the case [*Warren v. Palmer*] involved largely post-bankruptcy issues, and liens which were necessary for the continued operation of rail service, the decision is not directly apposite" (Penn Central Trustees' brief, 14a).

At pages 17-18 of the Penn Central Trustees' brief, it is claimed that this Court remanded the *New Haven Inclusion Cases* "to the Commission and the appropriate federal courts." This characterization is a travesty of the actual order of this Court, dated June 29, 1970, filed in the United States District Court for the District of Connecti-

cut on July 31, 1970, in which it was stated: "These causes be and they hereby are remanded to the United States District Court for the District of Connecticut for further proceedings in conformity with the opinion of this Court."

At page 19 of the Penn Central Trustees' brief, it is stated "in fact, however, the New Haven Reorganization Court reserved jurisdiction only to pass upon objections to the amount and the form of consideration *which had been previously filed with the court.*" As previously noted, however, the New Haven Reorganization Court provided, as a basic condition of its order, that the conveyance and the payment of consideration were to be without prejudice to the right of any party not only to contest the fairness and adequacy of the consideration, but also "the other terms of the inclusion of the Debtor's operations in Penn Central Company" (Manufacturers' brief, 6A).

II. Counter-Statement of Pertinent Facts.

The facts of this case are not disputable. Petitioner believes, however that the factual summary contained in the Penn Central Trustees' brief is inaccurate in a number of instances of significance to the Court's consideration of the Petition; and, accordingly, brings the following to the Court's attention.

Purchase agreement was never approved by New Haven Reorganization Court.

1. At pages 3-4 of the Penn Central Trustees' brief, in the discussion of the effect of the purchase agreement among the Pennsylvania Railroad, the New York Central Railroad and the New Haven Trustees, no reference is made to the fact of record (previously recognized by this Court, 399 U.S. at 410, n. 46) that the New Haven Reorganization Court never approved the purchase agreement. Further, although the purchase agreement had been approved by the Commission, that approval was specifically conditioned upon an approval by the New Haven Reorganization Court (327 I.C.C. 475, 553 (1966)).

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"Free and clear" transfer was subject to reserved jurisdiction.

2. At page 5 of the Penn Central Trustees' brief, the order of the New Haven Reorganization Court approving the transfer to Penn Central "free and clear" is noted simply to have been with certain unspecified exceptions. In fact, the New Haven Reorganization Court made the entire transfer subject to the condition that the "conveyance of the Debtor's assets by the New Haven Trustees and the payment of consideration by Penn Central Company, as provided herein, shall be without prejudice to the right of any party to contest the fairness and adequacy of the consideration and the other terms of the inclusion" (¶J, Manufacturers' brief, 6A). In addition, the New Haven Reorganization Court also reserved jurisdiction to adjudicate all objections and claims theretofore filed, except those going to the fact of inclusion itself (¶K, Manufacturers' brief, 6A).

Furthermore, it is relevant to these facts that, although it was unconditionally bound to include the New Haven's properties, Penn Central sought a stay of such order from a three-judge district court, notwithstanding that it provided for a "free and clear transfer," specifically on the basis that the matters covered by the reservations of jurisdiction should be resolved before Penn Central should be required to carry it out.

Increase in purchase price was due to Commission's undervaluation of assets.

3. At page 5 of the Penn Central Trustees' brief, it is stated that the New Haven Reorganization Court increased the consideration which "Penn Central was to pay for assuming the New Haven's deficit operations." There was, in fact, no payment of any kind for New Haven's *operations* (399 U.S. at 482); the $29 million increase in purchase price ordered by the New Haven Reorganization Court related to the Commission's undervaluation of the

assets which Penn Central received at liquidation value, discounted for the costs of a liquidation. As this Court pointed out in the *New Haven Inclusion Cases*, "we thereby accord the bondholders the right to a liquidation and a per parcel sale that is theirs by virtue of their mortgage liens" (399 U.S. at 489-490).

Underwriting plan was to assure full payment of purchase price.

4. At page 5 of the Penn Central Trustees' brief, it is stated that the New Haven Reorganization Court "devised a so-called 'underwriting plan' to cushion the New Haven estate against a decline in the value of Penn Central common stock below $87.50 per share." The stock has never reached that price. As put by this Court, in analyzing the underwriting plan (399 U.S. at 487, 488): "In sum, the reorganization court devised a plan that added to its assessment of present worth both a reasonable assurance of realization of such worth and the opportunity of additional gain."

This Court was referring to Penn Central's bankruptcy in recognizing the impact of recent events upon the uncompleted purchase transaction.

5. At page 7 of the Penn Central Trustees' brief, it is implied that, when this Court referred in its opinion to "the impact of recent events," it intended to refer to the reduction in the market price of Penn Central common stock on the New York Stock Exchange between January 2, 1969 and May 30, 1970. The finding of the New Haven Reorganization Court was that this Court was referring to the filing by Penn Central of a petition for reorganization under §77 which occurred only eight days prior to the entry of this Court's opinion, and which was specifically referred to at the outset of the Court's opinion.

New Haven Reorganization Court considered Penn Central bonds and stock in relation to payment of purchase price.

6. At page 9 (¶2) of the Penn Central Trustees' brief, the New Haven Reorganization Court's Order of Remand is summarized as having given no credit whatever for the Penn Central bonds and stock received by the New Haven Trustee. In fact, the New Haven Reorganization Court provided that such bonds and stock would be held as security "and to the extent such security is liquidated or is retained under a plan of reorganization, Penn Central shall be credited with the fair value thereof" (New Haven Trustee's Petition, A64). Furthermore, the New Haven Reorganization Court provided that the purchase price due the New Haven would be reduced by all interest and dividends received by the New Haven on such bonds and stock *(Ibid.)*.

New Haven Reorganization Court did not attempt to set aside purchase and sale of assets.

7. At page 9 (¶3) of the Penn Central Trustees' brief, it is stated that the New Haven Reorganization Court "purported to set aside the purchase and sale of the New Haven assets." There is no such indication anywhere in the Memorandum of Decision or the Order of the New Haven Reorganization Court (New Haven Trustee's Petition, A25-A65), and no such inference may fairly be drawn.

"Related proceedings in the Philadelphia Court" constituted an improper collateral attack.

8. At page 10 of the Penn Central Trustees' brief, reference is made to "related proceedings in the Philadelphia Court." No mention is made that such proceedings were instituted by petition of the Penn Central Trustees on June 17, 1971 (the Memorandum of Decision of the New Haven Reorganization Court having been entered on June 11, 1971) collaterally attacking the decision of the New Haven Reorganization Court.

CONCLUSION

Petitioner submits that, for the reasons stated in his Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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